Nos: 71-1176
71-1177

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

UNITED STATES OF AMERICA,

PLAINTIFF-APPELLEE

vs.

FRANCIS X. KRONCKE AND
MICHAEL D. THERRIAULT,

DEFENDANTS-APPELLANTS

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF MINNESOTA

BRIEF FOR APPELLANTS

KENNETH E. TILSEN
Attorney for Appellants
400 Minnesota Building
St. Paul, Minnesota 55101

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United States of America,

Plaintiff-Appellee,

vs.

Francis X. Kroncke and
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Defendants-Appellants.

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ISSUES PRESENTED FOR REVIEW

1. Did the court err in striking the evidence of the defendants and refusing to instruct the jury relative to the defendants' defense of necessity?

2. Did the court err in not ruling on instructions or on the evidence until after the completion of all final arguments?

STATEMENT OF THE CASE

This is an appeal from a judgment of conviction on March 12, 1971, based upon a jury verdict finding the defendants guilty of violating the Military Selective Service Act of 1967 (50 App. U. S.C. Sec. 462) pursuant to an indictment which charged the de-

fendants with attempting to interfere with the administration of the Act by entering a certain selective service local board office to remove and destroy official records contained therein. Trial commenced with selection of the jury on January 11, 1971. The jury verdict was returned on January 18, 1971. Both defendants were sentenced to the custody of the Attorney General or his authorized representative for imprisonment for a term of five years.

STATEMENT OF FACTS

The indictment was returned on September 23, 1970, alleging a violation of the Military Selective Service Act of 1967, 50 App. U.S.C. 462(a). Arraignment was held before Judge Neville on October 2, 1970. The matter was continued for 60 days during which period of time cases related thereto, U.S. vs. Tilton and Turchick, Cr. 6-70-119, and U.S. vs Beneke, Olson and Simmons, Cr. 1-70-92 were tried. Various motions were presented to the Court on December 9, 1970. Mr. Kroncke requested and was granted permission to represent himself. The Court granted defendants' request that place of trial be set in Minneapolis. Various motions relative to discovery were made. A motion was made to strike the venire on the grounds that three specific groups had been eliminated from the jury (T. 12-9-70, p. 46). Among the reasons stated for the motion was the elimination of potential jurors between the ages of 21 and 23 and, in addition, the elimination of persons under the age of 21. The court denied the motion. Other motions relative to discovery, the political nature of the trial,

the unconstitutionality of the Military Selective Service Act of 1967 were made and denied. The trial commenced on January 11, 1971. A motion for a writ of habeas corpus ad testificundum to bring to the court Father Daniel Berrigan and Father Philip Berrigan was made and denied. Both defendants presented extensive separate trial memoranda to the court and the United States Attorney outlining the positions they would take during the trial (T. Vol. I, p. 4). Counsel for defendant Therriault and Mr. Kroncke, as attorney pro se, made extensive opening remarks explaining to the jury the positions they would take immediately following the opening remarks of the U. S. attorney at the beginning of the case (T. Vol. II, pp. 30-44 and Vol. II, pp. 44-59).

The government's witnesses consisted of a number of FBI special agents who testified that they went to the City of Little Falls, Minnesota, on July 10, 1970 (T. Vol. II, p. 61) arriving about 6 P.M. Six agents in all went to Little Falls (T. Vol. II, p. 62). They went to the police station (T. Vol. II, p. 63) and about 9 o'clock to the office of the selective service board in Little Falls (T. Vol. II, p. 69). About 11:30 P.M. they received a communication that persons were entering the building (T. Vol. II, p. 69-70). They heard various sounds indicating entry into the selective service board office and that persons were in the selective service office and waited 12 to 15 minutes before entering the selective service office (T. Vol. II, pp. 70-71). They entered the selective service office and found the two defendants (T. Vol. II, p. 71). They arrested the defendants and found several file drawers partly opened and a large plastic

type bag which contained various papers which were later determined to be records which had been in the drawers of the selective service office (T. Vol. II, p. 75). There were also various tools related to means of entry. The agents didn't feel they were in any danger from explosives or in any other way that the defendants presented a danger to them (T. Vol. II, p. 80). They were unarmed and offered no resistance (T. Vol. II, p. 80-81). A flower pot had been on the window and it appeared that the defendants took some care to avoid disturbing the flowers in the office (T. Vol. II, p. 81-82). There was no effort to resist the arrest (T. Vol. II, p. 83). The defendants conversed freely with the agents (T. Vol. II, p. 73). On the ride back to St. Paul from Little Falls it appears that the defendants and the FBI agents engaged in a wide ranging discussion of the war in Vietnam, violence, non-violence, etc. (T. Vol. II, p. 134-135). The FBI obtained four letters addressed to the news media from the car in which the defendants had driven to Little Falls (T. Vol. II, p. 139-140). (Government's Exhibits 37, 38, 39 and 40) Exhibit 37 was addressed to the Editor of the Little Falls Gazette and begins as follows:

> "Attention all draft age men of Morrison County:
> We the Minnesota Conspiracy to Save Lives have destroyed all the I-A files for your County. In effect, what we are trying to communicate by our action is: Do you want your life? If you do, then use this opportunity to take control of it. If you don't want your life, then go down to the Morrison County draft board and give it back to the Selective Service System. . .
> We invite you to take control of your life and thus become a member of the Minnesota Conspiracy to Save Lives. We've done our part to give you back

your life. The rest is up to you.

Say NO to DEATH - Say YES to LIFE!"

Although government's exhibit 37 makes reference to the destruction of the I-A files of Morrison County no files were destroyed (T. Vol. II, p. 145).

Colonel Robert P. Knight testified in some detail as to the functioning of the selective service system (T. Vol. II, p. 149, et seq). The primary function of the local board of the selective service system is to obtain people into the armed forces of the United States (T. Vol. II, p. 162). In 1970, 4,019 persons were inducted in Minnesota (T. Vol. II, p. 163). In 1969 just over 6,000 persons were inducted in Minnesota (T. Vol. II, p. 163). The court refused to permit counsel to cross examine Col. Knight regarding a statement allegedly made by him that there have been in the current year approximately 10 to 12 refusals to accept induction per week in the State of Minnesota (T. Vol. III, p. 3). The court further refused to permit the witness to testify to the number of persons indicted in the State of Minnesota in connection with refusing to submit to induction although the witness indicated that he keeps such records on a running record bases (T. Vol. III, p. 4). Counsel made an offer to prove at this time through the witness and other witnesses that draft refusals in Minnesota had been running at the induction center at a rate, estimated by the witness then on the stand, of 10 to 15 refusals per week, that there currently are pending for trial in the District of Minnesota approximately 100 selective service cases pursuant

to indictments; that according to Mr. Justice Bowles of the Justice Department, draft prosecutions nationally are running at the rate of 325 to 350 a month (T. Vol. III, pp. 5-6). In accordance with the prior trial memorandum and the argument to the jury, this was pointed out to the court as one of the three major areas of the evils intended to be avoided by the defendants' acts. This was identified as the forced criminalization of the young of America.

The defense also offered to prove that the State Director of Selective Service has sent reprints of various articles concerning the war in Vietnam to the members of the local board recognizing the relationship between the operation of the selective service system and the war in Vietnam (T. Vol. III, p. 15, 16, 17). The court refused to permit the line of inquiry and indicated that if the witness were recalled for redirect examination his ruling would be the same (T. Vol. III, p. 17). Defendant Kroncke had visited with Col. Knight concerning the selective service system on prior occasions (T. Vol. III, p. 17-18). The selective service system maintains at least one office in every county in the United States. As such, next to the Post Office, it is the most widely dispersed arm of the United States Government (T. Vol. III, pp. 20-21). It appears that there were 7 or 8 draft "raids" in Minnesota in the calendar year, 1970 (T. Vol. III, pp. 26-27). Minnesota is about average (T. Vol. III, p. 27).

The court refused to permit defendants to inquire into the number of persons who request conscientious objector status to whom that status is refused and who end up as defendants in

criminal prosecutions (T. Vol. III, p. 47). The court further refused to permit inquiry as towhether or not the war in Vietnam has required the selective service system to change its practices because of the changed attitude of the public toward the selective service system as perceived by the selective service system over the course of the continuing war in Vietnam (T. Vol. III, p.49). The result of other draft raids in Minnesota were that people were not drafted to go to Vietnam during certain months of 1970 in Minnesota (T. Vol. III, p. 55). There have been months where the State of Minnesota has fallen short of its quota of inductees into the army by reason of persons who were called and refused induction (T. Vol. III, p. 56).

The defendants called as a defense witness, David Gutknecht who testified that he was one of a group of persons who helped form the Twin City Draft Information Center in 1967 for the purpose of building a movement of opposition to the war in Vietnam and to the draft and for the purpose of providing information to young men in regard to the selective service system (T. Vol. III, p. 77). The Twin City Draft Information Center put out literature relating to the war in Vietnam and to the draft, members did public speaking on those topics, organized public rallies at which men would refuse induction or state their opposition to cooperating with the draft. They helped men who were being prosecuted for refusing the draft (T. Vol. III, p. 78). One of its main activities is counselling men concerning the draft and alternatives (T. Vol. III, p. 78-79). Mr. Gutknecht took a public position of non-cooperation with the draft, returned his draft card, his induction was speeded

up, he refused induction and he was indicted and convicted. He was sentenced to four years in prison. His conviction was affirmed by the Court of Appeals and he appealed to the United States Supreme Court which ruled in his favor and determined that the regulations under which his induction was speeded up were improper (T. Vol. III, p. 79-80). As a result of Mr. Gutknecht's action thousands of indictments against persons charged with violation of the selective service system were reversed or dismissed (T. Vol. III, p. 80). The witness maintained records as to the number of persons currently awaiting trial for refusal to accept induction in the District Courts for the State of Minnesota. The court refused to permit the witness to testify to the numbers of persons involved (T. Vol. III, p. 81, 82). Testimony as to the persons in the Federal Prisons from the State of Minnesota who are there as a result of their refusal to cooperate with the selective service system was objected to and the objections were sustained (T. Vol. III, p. 82 and 83). The witness had the lists of names and addresses of persons in Minnesota in prison as a result of their violation or the refusal to cooperate with the selective service system in the State of Minnesota. An offer of proof was made with respect to the preceding testimony which offer followed the previously submitted trial memorandum (T. Vol. III, pp. 83-89).

Gordon S. Neilson, a 23 year old married man whose wife had just given birth to a baby girl, testified. He was in the United States Marines from February, 1966 to February, 1968. After boot camp at Camp Pendleton, California, he served 13 months in Vietnam from August, 1966 to September, 1967 (T. Vol. III, pp. 99-

101). He is currently in the inactive reserves (T. Vol. III, p. 101). He was a corporal in India Company, Third Battalion, Fifth Marines, stationed out of Chu Lai and later moved to Cam Ky and then to Thang Binh (T. Vol. III, p. 102). He started out as an ammo carrier, became a section leader his last four months in Vietnam and, as such, was in charge of 16 men, 2 - 16 mm. mortars, their operation and their firing. He was the forward observer for both guns (T. Vol. III, p. 102). His company was known as the "Igniting Eye" (T. Vol. III, p. 103). It stood for the burning eye. "We burned every village we went through in a number of our operations." (T. Vol. III, p. 104) Their squad was assigned to search and destroy missions (T. Vol. III, p. 104). A search and destroy mission was described as one where the American troops go in and search and destroy the enemy, food, homes, villages, supplies if they found any (T. Vol. III, p. 104). The witness was prepared to describe specific incidents but the court ruled in advance that it would not permit any description of specific incidents or alleged atrocities (T. Vol. III, p. 105). Further descriptions of search and destroy missions involved throwing grenades in individual homes and indiscriminately burning of homes (T. Vol. III, p. 106). They would burn as many homes in the villages or hamlets as they had matches (T. Vol. III, p. 106). The court sustained objections to further discussions of search and destroy missions (T. Vol. III, p. 107). It sustained objections to descriptions of what happens when a grenade is thrown into a hut or hutch (T. Vol. III, p. 107). The witness indicated that the actions he described were not in opposition to the training given him but, on the contrary, "You were

a better marine if you did more fantastic things, if you could burn more hutches, if you could be more you know, it was just the whole idea of when you were in boot camp. The meaner you could be the more gooks you could kill, the whole idea continued on into the field." (T. Vol. III, pp. 108-109) The activities described by the witness were carried on at the direction of officers, both commissioned and non-commissioned (T. Vol. III, p. 109). The witness' experience in first doing what he thought was right and then realizing that "instead of being a gook it was a human being, instead of being a hutch it was a home" has been a source of difficulty to him since leaving the service (T. Vol. III, p. 110). It was difficult for the witness to discuss the incidents even after this period of time (T. Vol. III, p. 111). The witness did have several individual person-to-person stories that he could tell if the court had permitted (T. Vol. III, p. 111). Mr. Neilson had received two purple hearts as a result of combat in Vietnam (T. Vol. III, p. 111). He knew neither of the defendants prior to testifying (T. Vol. III, p. 111). On memorial day, 1969, he participated in starting an organization which has become known as the Veterans for Peace.

Robert E. Anderson testified on behalf of the defendants. He is a 27 year old student at the University of Minnesota presently also employed as a research assistant for a State Senator (T. Vol. III, p. 118). He served in the U. S. Army from August, 1966 until May, 1969 (T. Vol. III, p. 119). He is still in the inactive reserves in the Army. On discharge he was a Sgt. E-5 (T. Vol. III, p. 119). After training in Fort Leonard Wood, Missouri, and some

time in Fort Ord, California, he departed with the 198th Flight Infantry Brigade for Vietnam in October, 1967 (T. Vol. III, p. 120). He spent 13 months in Vietnam, departing from Vietnam in November, 1968 (T. Vol. III, p. 121). He was a sergeant in an infantry squad and leader operating mostly southwest of Tam Ky which is southwest of Da Nang and west of Chu Lai. This section is the northern most province of South Vietnam (T. Vol. III, p. 121). Most of his time was spent on search and destroy missions (T. Vol. III, p. 122). He described search and destroy missions as killing the animals and breaking up the tools and killing cattle, water buffalo, chickens (T. Vol. III, p. 122). They would stomp on chickens, shoot cows and burn the dwellings. They would break up farm implements such as saws or small tools so they couldn't be used again (T. Vol. III, p. 124). They would scatter the rice and earthen pots on the ground so there would be no food (T. Vol. III, p. 124). This activity was done on orders of officers (T. Vol. III, p. 124). The court refused to permit the witness to testify as to his observations concerning the treatment of the prisoners (T. Vol. III, p. 126). The witness had a combat infantry badge and bronze star. He did not know either of the defendants. He is also a member of the Veterans for Peace (T. Vol. III, p. 127). The witness' activity after returning to the United States created a total disorientation that took months to overcome. "It's been harder and harder for me to understand why I did what I did. I understand why I did it but it's harder and harder to accept having done what I did." (T. Vol. III, p. 131)

Dr. Romeyn Taylor testified for the defendants. He is a professor of history at the University of Minnesota, a holder of a bachelor's degree from Harvard University and an M.A. and Ph D. from the University of Chicago. He has been teaching at the University of Minnesota for ten years where he teaches Chinese History and Asian History. He has testified before congressional hearings. His major course of teaching, study and lecturing relates to Asian history and southeast Asian history. He has given lectures and special courses on Vietnam (T. Vol. III, pp. 132-134). He helped organize the first Vietnam Teach-In on the campus of the University of Minnesota in 1964 or 1965 (T. Vol. III, p. 134). It has been his public and professional work to communicate facts concerning southeast Asia and to keep aware of the facts relating to the nature of American involvement militarily (T. Vol. III, p. 135). In this connection he maintains clipping and periodical files for an organization called the Committee of Concerned Asian Scholars (T. Vol. III, p. 135).

> "The damage to Vietnamese Society cannot be measured alone by the statistics of war casualties. The Vietnamese society is a peasant society. This has been clear, I think, from earlier testimony. Most of the population in Viet Nam has in large measure been uprooted and transported to other areas as detainees or refugees of the war. The number of refugees runs into the millions, which is a fantastic consideration in view of the fact that the population is only about 15 million.
>
> A substantial portion of the population is refugees. For a Vietnamese village to be uprooted from its original site means separation from its lands, separation from its ancestral burial sites, which is very important from a religious point of view. They are also separated from their local religious cults, which is very important to maintain.

To simply transport a village from one place to another results in a drastic disorganization of the community, quite apart from the physical hardships involved in this kind of operation.

I should further add that the same process is beginning to occur in Cambodia where whole communities have been destroyed by allied operations, U.S. Aerial bombardment and South Vietnamese artillery bombardment. The process is continuing into Cambodia.

. . . Laos has been subject to the heaviest sustained aerial bombardment in history, and a bombardment which is being maintained at a very high level at the present time, much of the bombing being of an extreme high altitude-type by B-52's.

. . .The effect of the bombing has been to compel many of the hill tribes to move out of their homelands and down into the lowlands areas which are inhabited by a different and generally hostile ethnic group.

Also, the organization of the hill tribes by both sides, by the C.I.A. on one side and by the North Viet Namese or by the Laos Communists on the other side has resulted in the decimation of some of the hill tribes. They have almost run out of adult males in some of the hill tribes in Laos." (T. Vol. III, pp. 142-144)

The witness also testified to the tremendous impact of the war in Cambodia. Approximately 200,000 Vietnamese remain in Cambodia refugee camps (T. Vol. III, p. 145).

"Based on official figures the number of refugees run into several million. The number of people killed, Vietnamese killed in the war, civilians and military and the distinction, I gather, is not always very clear, is approximately 1,100,000. The total injured and wounded is approximately 2,200,000. So you have 1,100,000 people killed and two and one-fifth million people wounded, plus several million more refugees.

I feel it is unnecessary to say more to indicate that this society has been torn apart. We are talking about a population of 15 million." (T. Vol. III, p. 146)

In terms of comparative data about the war it appears that civilian casualties were running at the rate of 5,000 a month, that is, sixty thousand per year currently. This exceeds every year except 1968. Civilian casualties result primarily from aerial bombardment and search and destroy missions and combat. These are

what cause the casualties. As the casualties increase it indicates the level of military activity has remained at a continuing high level (T. Vol. III, p. 147-148). Professor Taylor also testified concerning a strike at the University of Minnesota at the time of the American invasion of Cambodia which was unique in American history in that there is no evidence of previous strikes over national foreign policy by students (T. Vol. III, pp. 152,153,154, 155,156). Testimony indicated that at first the Vietnamese war was with the French. The Vietnamese were trying to liberate themselves from French control. At that time the French military effort was armed and financed by the United States. The American military personnel were present. There was an integration of American weapons into the French army. The United States has been involved in the Vietnam war continuously since about 1945 or a little earlier if you want to count the military assistance that the United States gave to the guerillas when they were fighting the Japanese (T. Vol. III, p. 156).

Marv Davidov was called to testify for the defendants (T. Vol. III, p. 161). Mr. Davidov, a 39 year old man, who is a teacher at the University of Minnesota Experimental College, manager of a Mississippi cooperative shop called "The Liberty House", has actively been involved in efforts to bring peace in the United States since 1956 or 1957 (T. Vol. III,p. 161-162). In 1961 he and six other Minnesotans became the original Minnesota Freedom Riders when they went to Jackson, Mississippi to enter a waiting room of the Greyhound Bus terminal where he was arrested and convicted. Four years later the United States Supreme

Court reversed the conviction (T. Vol. III, p. 162-164). The witness served time in the Mississippi penitentiary as a result of the conviction but at present as a result of part of his efforts the bus terminal facilities in Mississippi, at least in Jackson, are no longer segregated (T. Vol. III, p. 165). In 1963 and 1964 the witness spent 17 months with others on a peace walk from Quebec, Canada to Miami, Florida (T. Vol. III, p. 166=167). The witness has been on the Today Show on NBC, has been interviewed in the New York Times and the Minneapolis Star and Tribune and on the Joe Pyne show five times as well as the Les Crane Show and the Henry Wolf Show, a local television and radio show (T. Vol. III, p. 168-169). He was involved in the first mass protests against the war in Vietnam in Washington in 1965 (T. Vol. III, p. 169) and many similar activities since (T. Vol. III, p. 170 et seq). In 1968 he helped organize the Honeywell Project, an attempt by local citizens to stop the directors of Honeywell Corporation from producing anti-personnel fragmentation bombs for use in Vietnam (T. Vol. III, p. 172-173). He also worked in political campaigns for Senator Humphrey, then Congressman Eugene McCarthy, Adlai Stevenson and John F. Kennedy(T. Vol. III, p. 174). A Honeywell anti-personnel fragmentation bomb was offered in evidence. The court sustained objections to its admission (T. Vol. III, p. 175). The witness has lectured at at least 100 American Universities and churches, synagogues, forums of different kinds, before Chamber of Commerce groups, high school groups, etc., speaking primarily on the subjects of pacifism and non-violence. (T. Vol. III, p. 178) He is currently teaching a class on non-violence (T. Vol. IV, p. 145). Non-violence

was described as the art and science of an attempt to solve human conflict without using murder, exploitation or brutality either physically or spiritually or psychologically. The process of non-violence was described as:

> "One writes letters to the editors as means of bringing attention to the people what the problem is. One attempts to negotiate with the people that you think are responsible for having created the problem leaving the doors of communication always open. One engages in peaceful demonstration, even in electoral politics you attempt to present your view through the structure, always working within the structure, until you or if you discover that the vehicles, the doors of communication are closed and the injustice persists. Someone who believes in non-violence must use civil disobedience in order to raise the problem in a very profound way and bring it to the attention of the people." (T. Vol. IV, p. 48)

Activity of this type has an effect of bringing about change in the social situation examples of which are the efforts of young men subject to the draft refusing the draft as an act of civil disobedience and the experience of non-violent protest in bringing about the civil rights act (T. Vol. IV, p. 49).

The witness testified that draft board raids deepen the question of the war and the draft not only in the minds of young people throughout the country but all over the world and certainly in the minds of government officials (T. Vol. IV, p. 51). The court refused to permit the witness to answer whether or not the act of entering a draft board and removing records was a violent act or a non-violent act or whether it fell within the tradition of non-violent acts of civil disobedience similar to those to which the witness had been testifying (T. Vol. IV, p. 51, 52).

The witness testified to the history of non-violent movements in America and that the war in Vietnam was creating a moral crisis

among the American people (T. Vol. IV, p. 123) and that there is a definite relationship between the belief in non-violence and the inalienable right to life, liberty and the pursuit of happiness spoken of in the American Declaration of Independence (T. Vol. IV, pp. 127-128).

Dr. Arthur H. Westing testified on behalf of the defendants. He is a professor of botany at Windom College in Putney, Vermont (T. Vol. IV, p. 2). Prior thereto he taught forestry at Purdue University. Dr. Westing holds a bachelor of arts degree with honors from Columbia, majoring in botany, a master of forestry degree, majoring in forest ecology from Yale and a doctor of philosophy degree from Yale in plant physiology. He had post doctoral study at Harvard. He is the publisher of about 40 scientific and technical articles, a member of a number of honorary professional societies including the American Association for the Advancement of Science (T. Vol. IV, p. 3). The American Association for the Advancement of Science is the largest scientific association in the country having 130,000 members. It commissioned a study of the ecological effects of the military use of herbicides in South Vietnam at its annual meeting in December, 1969, and appointed Dr. Westing director of that study (T. Vol. IV, p. 4).

Dr. Westing worked full time on the study from the end of January, 1970, to the middle of April, 1970, reviewing the published literature, conferring with various people in the United States Government in Washington and in Vietnam. He organized a meeting of 23 experts in June which met for a week. These were people with various scientific and technical backgrounds, half

of whom had spent considerable time in Vietnam. Following the full week of study by the various experts, a month long trip was taken to Vietnam by a group consisting of Dr. Westing, a biochemist from Harvard University, a physician and professor of surgery at Harvard University and an ecologist from Yale University (T. Vol. IV, p. 4-5). The results of their study were presented publicly on December 29, 1970, at the annual meeting of the American Association for the Advancement of Science in Chicago (T. Vol. IV, pp. 5-6). Dr. Westing indicated that he personally took slides to explain the scope and effect of the herbicide program in Vietnam (T. Vol. IV, p. 6). These were shown to the jury (T. Vol. IV, p. 8, et seq). The slides were taken with the full approval and support of the United States mission in Vietnam. The United States Ambassador supplied the group from the American Academy for the Advancement of Science with a full time vehicle and chauffeur and one of his three personal helicopters (T. Vol. IV, pp. 8-9). A slide was shown illustrating unsprayed Vietnamese jungle of which there are 25,000,000 acres. Bomb craters 40 feet across and 40 feet deep were shown (T. Vol. IV, p. 9).

The group could not help but be impressed by a number of ways in which the military activities enormously disrupted the ecology of the country (T. Vol. IV, p. 9-10). These included, in addition to the herbicide programs, bomb craters which were permanent scenes on the landscape and the clearing of thousands of acres by bull dozers. Approximately 500,000 acres have now been bull dozed (T. Vol. IV, p. 10). The jury was shown how the herbicide spraying is done (T. Vol. IV, p. 10). The result of the procedure is a herbicide dosage of about 10 times as high as the maximum recom-

mended in this country (T. Vol. IV, p. 10-11). Pictures representative of 5,000,000 acres of destroyed forests were shown.

> "Vietnam happens to be just the size of New England. The sprayed area looks like this (exhibiting picture of total devastation). It is about the size of the commonwealth of Massachusetts." (T. Vol. IV, p. 11)

Pictures were shown of over 1,000,000 acres where everything was killed (T. Vol. IV, pp. 11-12). The United States Forest Service estimates destruction at six and one-half billion board feet of prime tropical timber (T. Vol. IV, pp. 12-13). In addition to the upland forests there is about a 1,000,000 acres of mangrove forest. About one-quarter of it has been sprayed (T. Vol. IV, p. 13):

> "All indications are now that there is no sign of recovery and that there will be many decades when hundreds of thousands of mangrove forest will look like this (slide showing total devastation)." (T. Vol. IV, pp. 14-15)

In addition, there were slides depicting crop destruction programs. The United States sprayed about 600,000 acres of rice crops (T. Vol. IV, p. 15). The food denial program denies food, specifically rice.

> "We have destroyed, in terms of rice, 125,000 tons of milled rice or 250,000 of unmilled, harvested rice." T. Vol. IV, p. 16

In addition, the forest program also kills crops (T. Vol. IV, p. 16). The partly destroyed upland forest represents four million and some acres. The totally destroyed upland forest represents one million acres. The totally destroyed mangrove forest represents 1/4 million to 1/2 million acres (T. Vol. IV, p. 18).

The effect of the program on the people was part of the study. The extent of the effect on the people was enormous (T. Vol. IV, pp. 19-20). As many as 1/2 million of the hill tribes

had their social life disrupted (T. Vol. IV, p. 20). The witness's testimony must be taken in the context that of the approximate 18 million Vietnamese people 3 or 4 million live in the big cities, another 3 million are refugees and all the rest are subsistence farmers, peasants (T. Vol. IV, p. 22).

Andrew J. Glass was called on behalf of the defendant. Mr. Glass is a journalist with a degree from Yale Univeristy. His background includes seven years with the New York Herald Tribune, much of that time with the Washington Bureau and as chief congressional correspondent. He was national affairs reporter for the Washington Post and currently congressional correspondent of the National Journal, a weekly non-partisan publication devoted to public questions and the federal government. It is mostly a research tool by other newspapers by the Government, by corporate entities and libraries (T. Vol. IV, p. 26). The witness testified that in July and August of 1970, as congressional editor of the National Journal he conducted a study of the relationship between draftees and the burden they share in the fighting and dying in Vietnam. This study was published in the National Journal in August, 1970, and thereafter appeared in the Congressional Record (T. Vol. IV, p. 27).

The witness testified that the chances of a draftee serving in Vietnam are between 50% and 80%. As of the date of the publication of the article, August 15, 1970, 80% (T. Vol. IV, p. 34). The witness further testified that 88% of the infantry in Vietnam are draftees (T. Vol. IV, p. 35-36). Although the witness had before him the actual number of persons killed in Vietnam and the actual number of draftees killed in Vietnam, the court would

not permit the witness to testify as to what the draftees' chances of being killed in Vietnam were nor to compare the rate of death of draftees with the rate of death of non-draftees nor to compare the chances of a draftee being killed with the chances of a non-draftee being killed in Vietnam (T. Vol. IV, p. 39 and 40). The court also refused to permit the witness to testify to the study as to the ratio of selective service non-fatal casualties as compared to non-draftee non-fatal casualties (T. Vol. IV, pp. 41-42). The witness did testify that there is a difference between a draftee's chances of survival in Vietnam and a non-draftee's chances but the court would not permit the witness to answer questions as to the content of that difference (T. Vol. IV, p. 42). The court would not permit the witness to answer whether a draftee's chance of survival in Vietnam was greater or less than a non-draftee's chances of survival (T. Vol. IV, p. 42). The witness also testified there was a difference between a chance of a draftee being wounded in Vietnam as against a non-draftee but the court would not permit an answer as to whether or not the draftee's chance of being wounded in Vietnam was greater or less than a non-draftee's chances of being wounded in Vietnam (T. Vol. IV, p. 43).

Dr. Daniel Ellsberg testified for the defendants. He is presently a senior research associate at the Center for International Studies in the Massachusetts Institute of Technology in Cambridge.

He spent the last 16 years of his professional life working for the President, the executive branch of the U. S. Government in research, consultation and in participation on national defense

matters, mostly classified, national security matters (except for three years he spent in the Marine Corps). (T. Vol. IV, pp. 74-76) He earned a B.A. in economics at Harvard University, studied in Cambridge, England, earned a PhD from Harvard, was an officer in the U. S. Marines (T. Vol. IV, p. 77). He was a member of the Society of Fellows at Harvard (T. Vol. IV, p. 78). In his fellowship studies at Harvard he studied not only economics but political science and psychology including decision theory. He is an expert in what is known as statistical decision theory or game theory (T. Vol. IV, p. 79). He was a consultant to the Rand Corporation in 1958 taking a permanent appointment as a researcher at Rand in 1959. His duties were entirely involved in the study of the decision process and strategic matters (T. Vol. IV, p. 80). The Rand Corporation has as its primary client the defense department of the national government, originally mainly the air force and now, more broadly, the various parts of the defense department. Dr. Ellsberg's work was entirely for the defense department (T. Vol. IV, p. 80). He did ad hoc studies on loan to the commander in chief of the Pacific and Hawaii for about 9 months and at one point did a study of command control under nuclear attack. He did consulting with the defense department and reported to the defense department and to the national security council on ways that the president could maintain control over our forces in the event of nuclear war. (T. Vol. IV, p. 81) In some cases he reported directly to the Deputy Secretary of Defense, Mr. Kilpatrick, and in other cases he reported to the Assistant Secretary of Defense for National Security Affairs. In one case he reported directly to McGeorge Bundy, the President's special assistant for National Security Affairs. In other cases he

wrote reports at Rand for general government distribution (T. Vol. IV, p. 82). He worked for the Eisenhower Administration and the Kennedy Administration while at Rand. His last year at Rand was spent in Washington doing a study of crisis decision making processes and the way crises arose and how they were resolved by the government (T. Vol. IV, p. 82). A special committee was set up under Walt Rostow of the policy planning council of the State Department of the United States Government for the witness to do a one-man study with access to the various departments of the Government involving C.I.A., State, Defense, relative to the Cuban missile crisis in which he participated and the U2 crisis, the Suez crisis and several others (T. Vol. IV,p.83). He spent 1963 and 1964 in Washington generally in that area of work, working under the Kennedy and then the Johnson Administrations (T. Vol. IV, pp. 83-84). In August, 1964 he left Rand and joined the Defense Department to continue studying the process of decision making from inside the Defense Department. His rank was that of GS 18 which is the highest civilian employee of the defense department (T. Vol. IV, p. 84). He worked entirely on decision making in connection with Vietnam. His work covered the period of the Tonkin Gulf reprisal, control of covert operations and he was later a member of the so-called William Bundy Working Group, a State Department working group analyzing alternative strategies for the President to consider in the fall of 1964. He was a State Department representative on that group (T. Vol. IV, p. 85).

Dr. Ellsberg testified that he was involved in the writing of the State Department white paper trying to justify our initiating

of the bombing and in decisions relating to the bombing of North Vietnam and then to the build up of ground troops in North Vietnam in the spring of 1965 and, finally, to the President's decision of July, 1965, to undertake an open ended troop commitment in Vietnam which, initially, was to involve mobilization (T. Vol. IV, p. 85). He subsequently volunteered to go to Vietnam (T. Vol. IV, p. 86). In 1965 he left the Department of Defense and joined the Department of State in order to go to Vietnam. His rank in the State Department was FSR-I which is the highest rank below presidential appointment and, in protocol, between major and lieutenant general (T. Vol. IV, pp. 86-87). He was in Vietnam for two years from 1965 through 1967 (T. Vol. IV, p. 87). In that connection, he drafted the first report of pacification progress surrounding Saigon for the President (T. Vol. IV, p. 88). His report on pacification indicated that no progress could be expected on pacification in the year, 1966 (T. Vol. IV, p. 91-92). On leaving Vietnam as a result of hepatitis he returned to Rand Corporation in Santa Monica, California, but mainly working in Washington (T. Vol. IV, p. 92). He became attached to the study group in the Department of Defense set up by Secretary of Defense McNamara to do an objective study of the decision making in Vietnam going back to 1940 up to 1968 (T. Vol. IV, p. 93). He wrote the major draft of one of the thirty volumes of the study which ran to 10,000 pages and consulted a great deal on the rest. He has read all of the study (T. Vol. IV, p. 93). Participation in the study was full time for over six months.* Thereafter

*(This is apparently the study made public in June, 1971, first by the N.Y. Times and subsequently by other newpapers, Senators and Congressmen. Dr. Ellsberg's role in making public this study is currently the subject of an indictment against him.)

he consulted on doing a study for the Department of Defense on the subject of the lessons of Vietnam. He was continuing to do consulting with the Department of Defense for the Assistant Secretary of Defense for International Security Affairs (T. Vol. IV, p. 93). This last work covered from June or July, 1967 to April, 1970 (T. Vol. IV, p. 94). He has now terminated any consulting relationship with the executive branch and is entirely doing his research from outside the Government at M.I.T. (T. Vol. IV, p. 94). He did consult with the present administration in a confidential relationship. He consulted with Henry Kissinger, the Special Assistant for National Security Affairs starting in December, 1968 just before the Nixon Adminstration took office. That work continued for six or seven weeks into the spring of 1969 (T. Vol.IV, pp. 94-95). His work was to outline for the President and the National Security Council a set of alternative strategies or options to pursue in Vietnam. This work was for the first presentation by Henry Kissinger to the National Security Council (T. Vol. IV, p. 95). He left Rand and the Government at that time because he felt it essential to speak freely to the public, to write freely and because he had been invited to testify before the Senate Foreign Relations Committee and he wanted to be free to respond to invitations such as that and the invitation to testify in cases such as the instant case (T. Vol. IV, p. 96). He had previously, as a citizen along with several other persons who were employed at Rand, addressed a letter to the New York Times and the Washington Post which reflected the professional expertise

of the signers of the letter, all of whom had worked on Vietnam for the Government, that the United States should adopt a policy of commitment to a total withdrawal from Vietnam (T. Vol. IV, p. 97). Since September, 1969 he has believed that that is the essential strategy that should be followed (T. Vol. IV, p. 98). That essential strategy was described as:

> "That the President as we put it should make a public commitment that he would withdraw United States' troops totally from Vietnam within a short, relatively short but reasonable period suggesting the time of 12 months. It corresponded to the suggestion made soon after that, or actually, soon before, it was while we were drafting it, by Senator Goodell which emphasized the congressional commitment. We had emphasized the presidential commitment." (T. Vol. IV, p. 98).

Dr. Ellsberg testified that he reached the conclusion that the war in Vietnam is not in the process of ending (T. Vol. IV, p. 103). He testified that acts such as those under consideration in the instant trial are major factors that go into decision making by the Government in determinations such as those involving troop withdrawal and increases in bombing (T. Vol. IV, p. 99):

> "Considerations of incidents such as happened in Minnesota of draft resistance or of civil disobedience were very much a consideration from 1964 before they had really occurred very much and 1965 on.
>
> They were a predominant consideration in the year 1968 and certainly in 1969; very explicitly so. This affects matters which I read officially but which I participated in addressing to the President." (T. Vol. IV, p. 100)

He explained that acts such as bombing North Vietnam would be regarded as "unjustified aggressive and immoral and would undoubtedly lead to great acts of resistance and that there would be domestic political costs and international political costs that far outweighed the effectiveness of bombing"(T. Vol. IV,

p. 100). He explained how considerations of domestic protest and acts of civil disobedience are considered in the decision making process (T. Vol. IV, p. 101). Dr. Ellsberg described specifically the situation in March of 1968 when Secretary of Defense Mr. Clifford was considering the request by the Joint Chiefs of Staff and General Westmoreland to send an extra 206,000 troops to Vietnam.

> "A key argument that was raised at that time against that was that domestic unrest and specifically draft resistance would be overwhelming." (T. Vol. IV, p. 102)

> "The actual decision was considerably influenced by an expectation of the acts such as we are considering today." (T. Vol. IV, p. 102)

It was Dr. Ellsberg's observations that acts of resistance were expected and policy was required to adapt to that situation (T. Vol. IV, p. 103). In addition, such acts had:

> "The effect that they are intended to have as I understand it, which is to speak directly to those officials, voters, judges, press people and so forth and challenge them to change their own position and attitudes on the war. I know that it had that effect in my case." (T. Vol. IV, p. 103, 104, 107, 108, 111, 115, 116, 120 & 121).

Dr. Ellsberg concluded that without domestic opposition to the war, the war will continue (T. Vol. IV, p. 105, 106). It was Dr. Ellsberg's professional opinion that acts such as draft raids were necessary and had the possibility and potentiality of ending the war (T. Vol. IV, pp. 119, 120):

> "I have so reported that. Yes. Publicly indeed, that I think they are necessary, not only that they have the potentiality; they are certainly not guaranteed to have that effect.
>
> Because I believe and I have concluded as a result of studying the decision making of the last 20 years that the only factor that would counteract the political considerations that impels successive administrations to continue the war, namely, to avoid the charge that they have failed or

> lost in Vietnam, can only be counteracted by political acts of a great mass of people, voters, press, congress, judges. Acting within their legal rights and responsibilities, I believe they will not be lead to take such actions which, in many cases, would go against their normal ways of life and their incentives unless they are morally challenged by the example of people, I might say, such as yourself. . . to consider the moral aspects of the war and what they demand of them as voters, as congressmen, as judges, as jurors and so forth." (T. Vol. IV, pp. 120, 121).

Although Dr. Ellsberg had previously testified before the United States Senate Foreign Relations Committee and in letters along with others to the New York Times, his testimony in the instant case was his first public appearance since leaving the United States Government (T. Vol. IV, pp. 108-109).

Staughton Lynd was called as a witness for the defendant. He is a historian with a B.A. from Harvard College, an M.A. and PhD. from Columbia University (T. Vol. V, pp. 36, 37). He is the author of an anthology on the history of non-violence in the United States and articles on slavery and the American Revolution. He is currently working on a book on the draft resistance movement and the war in Vietnam which, at the time of trial was due to be published in March, 1971 (T. Vol. V, pp. 38, 39). The titles to the books accurately disclose his special area of interest in American history (T. Vol. V, p. 39). The witness briefly described the role that individual acts of conscience have had in America in changing law and the practices of government and society (T. Vol. V, pp. 41-42). The witness described historically recognized phenomena where individual acts of moral dimension and violation of law changed the American political scene (T. Vol. V, pp. 43-44):

"Yes, both in the civil rights and peace movements. In the civil rights movement, one thinks first, naturally, of Dr. Martin Luther King, whose birthday this is (January 15); of the students who sat in at a lunch counter in Greensborough, North Carolina, in February, 1960, without having any way of knowing whether their action would be an action without echo, and an action which would fail to stimulate others to act likewise, or whether what would happen would be what did, in fact, happen, namely, that hundreds and thousands of others took up their example, so that their action proved to be historically significant.

These were actions often in defiance of law. They were actions which changed the conscience of the country . . . . " (T. Vol. V, p. 44)

"In the peace movement, too, the war in Vietnam is remarkable in American history in this sense; that in most wars in our history, there have been a handful of protestors, pacifists and others, at the time when the war began, but as the war proceeded, more and more people got caught up in the spirit of the war effort and dissent tended to trickle out and become insignificant.

In the war in Vietnam, and I say this as a historian, not as a person who has opposed the war in Vietnam, which I have; in the war in Vietnam, the process has been just the reverse; that in 1965 when the war escalated and the bombing of North Vietnam began, despite the fact that there was no declaration of war, I think it is fair to say that at that time, a majority of the people, perhaps even a majority of the young people in the United States, supported the war, and those who opposed it by individual acts of resistance, induction refusal, or otherwise, were often literally in danger of their lives from outraged crowds.

I think it is a simple historical fact that in the half decade since that first year of the escalated war, acts of resistance have the effect of changing the attitude of the majority of the people, or at least that the attitude of the majority of the people has changed, so that those who acted without knowing whether their acts would be historically effective in 1965 and 1966, can now look back, not with the satisfaction that the war has ended, but with the satisfaction that they have at least contributed to the majority of their fellow citizens, changing their attitude about the war." T. Vol. V, p. 44-45

As a historian Dr. Lynd testified that draft resistance and the possibility of a greater draft resistance if the war were further escalated was a significant contributing factor to the decision of the federal government to begin to de-escalate rather than further escalating the war in the spring of 1968 (T. Vol. V, pp. 47-48).

Draft resistance and the possibility of greater and further draft resistance continues to be a factor in government policy making relative to the conduct of the war in Vietnam (T. Vol. V, p. 48).

Dr. Lynd described the history of draft resistance beginning in 1965 with a number of individuals burning their draft cards through induction refusal and public acts of returning their draft cards (T. Vol. V, p. 49).

> "The form of resistance being considered here began in October, 1967, in Baltimore when Father Philip Berrigan and three others entered the Baltimore Customs House and attempted to destroy draft files. The reasoning, as I understand it, behind this new form of resistance was that since the number of men in the draft pool was much larger than the number actually called by the Government, therefore, even for a significant minority to declare that they would refuse to go would not necessarily prevent the Government from procurring the manpower which it needed to fight the war, and therefore, the reasoning of Father Berrigan and those who have followed him was that if their objective was not simply to testify to the state of their own consciences and their own unwillingness to fight in this war, but if, indeed, they wished to do what they could do to prevent the Government from being able to wage the war, then it seemed to them that it was indicated for them to take a kind of action which would prevent the Government, so far as they could bring this result about, from drafting anyone at all." T. Vol. V, p. 50

Dr. Lynd observed that there have been well over a dozen major nationally publicized draft raids of the type described including many many smaller ones such as the one under consideration in the instant case (T. Vol. V, pp. 50, 51).

It was his opinion that these actions have had an effect and hold out the possibility of an effect upon government policies vis a vis the war in Vietnam (T. Vol. V, pp. 50, 51).

Defendant Michael Therriault testified. He is 23 years old, born in Minneapolis, Minnesota, one of seven brothers and sisters.

His mother and four of his brothers and sisters were in the courtroom (T. Vol. IV, p. 140). He was educated in grade school in Whittier School, Incarnation, Basilica of St. Mary's, De La Salle High School, Nazareth Hall and South High School. He took his sophomore year of high school preparatory to seminary training. After leaving high school he enrolled in the University of Minnesota, completing four years and obtaining a Bachelor of Arts degree in psychology (T. Vol. IV, pp. 141-142). At age 18 he registered for the selective service (T. Vol. IV, p. 142) and explored the possibility of enlisting in the military service taking exams to see if he qualified, etc. (T. Vol. IV, pp. 142-143, 144). In 1969, as a result of a growing familiarity with United States policies including, particularly, the history of our involvement in Vietnam and proceedings of the international war crimes tribunals he decided he would no longer cooperate with the selective service system (T. Vol. IV, p. 144-145). He refused his physical exam and wrote a letter to his local board explaining his reasons (T. Vol. IV, p. 146). In January, 1970 he was declared delinquent and ordered for induction. He appeared but refused induction. He spent his time at the induction center talking to young men who were being processed (T. Vol. IV, p. 147). While at the induction center he brought photographs from the November, 1969 Life magazine of the My Lai massacre with him to assist in communicating his position at the induction center. (T. Vol. IV, p. 147) These pictures were marked and offered in evidence. Objections to their introduction by the U. S. Attorney were sustained by the court (T. Vol. IV, p. 148-150).

Mr. Therriault was aware at the time he refused induction that

80% of the inductees would go to Vietnam (T. Vol. IV, p. 148). In the summer previous to refusing induction he had served as a trainee for counselling in the Twin City Draft Information Center (T. Vol. IV, pp. 150-151). After leaving the induction center in January, 1970, he went to his local board and discussed with the clerk the relationship of the selective service system to the war in Vietnam (T. Vol. IV, p. 152). The major idea that Mr. Therriault was trying to indicate at the induction center and to the local board clerk was the relationship between the war in Vietnam and the selective service system as well as understanding the impact of the war on the Vietnamese people and the illegality and immorality of the war (T. Vol. IV, pp. 150-153).

It was later determined that Mr. Therriault's order to report for induction was illegal as his induction had been speeded up because of his protests against the war (T. Vol. IV, p. 154). Mr. Therriault described in some detail the choices facing persons in the selective service system and the difficulty in making decisions involving life, death, jail, fleeing the country, etc. (T. Vol. IV, p. 156).

> "So the choices overall which it offers the individual registrant, it's like no choice at all really." (T. Vol. IV, p. 157)

Mr. Therriault described his experiences which brought him into contact with individuals who were very much physically and psychologically damaged by the notion of selective service (T. Vol. IV, p. 157-158). As a result of these various factors Mr. Therriault testified that he embraced the principals of pacifism and non-violence (T. Vol. IV, p. 160). He described these principals as:

> "To make my life an effective force for change and to act with respect to certain values and those values are non-violence,

the notion of life, non-violence and love." T. Vol. IV, p. 160

A paper Mr. Therriault submitted to a humanities class at the University of Minnesota in the fall of 1969 was received in evidence as Defendant's Exhibit 4. Mr. Therriault described in his paper why it was necessary for him to refuse to participate with the selective service system:

> ". . . because I believe that all men are brothers; and my commitment entails using my life in accordance with my inner feelings to make brotherhood a reality in the world. The best place to begin creating this better world is at home; and the first place for me to make a contribution to the goal of creating a better world is in my own behavior and my own way of life. In choosing to serve an ideal of brotherhood and love I have at the same time necessarily refused to serve the contradictory master of the SSS and war. Therefore it was necessary (Ethically imperative) for me to cease cooperation with the SSS and thus violate its laws." (T. Vol. IV, p. 167)

Mr. Therriault testified that his acts of July 10, 1970, were motivated by his understanding of the increasing resistance on the part of many young registrants to the selective service system and:

> "the fact that because of their stance of non-cooperation they were going to be forced to be criminals, in a sense, peace criminals." T. Vol. V, p. 3

He was aware of the number of indictments handed down for selective service violations and the steadily increasing number of persons who entered the legal system as defendants as a result of the selective service system (T. Vol. V, p. 4). In addition to acting to attempt to prevent the forced criminalization of young persons, Mr. Therriault testified that he acted because of the increasing knowledge of the effects of the war in Indochina, especially in Vietnam upon the people of Vietnam (T. Vol. V, p. 5). In that regard Mr. Therriault testified to his understanding that the United States was breaking international laws to which it was a party. Particularly, the 1928 Kellogg-Briand Pact which forbids the use of

force or the threat of force in international relations, the 1923 Hague which forbids bombing of purely civilian installations, the 1907 Hague which forbids the use of weapons for the sole purpose of causing useless suffering which doesn't respect the immunity of the civilian population (T. Vol. V, pp. 5, 6, 7, 8). Mr. Therriault also testified that he was motivated by the violation of the United States of its pledges to respect the 1954 Geneva accords (T. Vol. V, p. 8). He further acted upon the conclusion that the United States' participation in the war in Vietnam was illegal and that the United States was guilty of war crimes (T. Vol. V, p. 9).

In explaining why, from his point of view, the illegality of the war in Vietnam affected Mr. Therriault's decision to go into the Little Falls draft board office, Mr. Therriault stated as follows:

> "It is not that laws should be the only thing that man considers when he decides whether or not he is going to do an act, but for government leaders to speak of a government of laws, it seems quite senseless that the government itself cannot be held accountable for the law. It seems that the United States is operating illegitimately within a framework which they accept by way of the Constitution, and if there is no legal recourse to bring the war to an end, then people have to resort to non-violent extra legal efforts based on morality and reason.
>
> I think there is a distinct difference between the laws which I feel the United States Government has broken and the law which Frank and myself have broken, in that the United States Government is violating laws in spite of its consequences upon people in general, and especially upon civilians, both in Viet nam and the United States, and the law which Frank and I broke was because of the consequences upon the people, especially the civilians." (T. Vol. V, pp. 10, 11)

Further testimony indicated that Mr. Therriault, in making his decision was aware of the relationship between the selective service system and the continuing war in Vietnam (T. Vol. V, pp. 12, 13)

and aware of the American defoliation and herbicide programs (T. Vol. V, p. 13). Mr. Therriault's acts were intended to raise the moral challenge testified to by the witness Ellsberg as to the only factor that would counteract the political considerations that have led successive administrations to continue the war, the only factors that possess the possibility and the potentiality of ending the war (T. Vol. V, pp. 13, 14, 15, 16).

Defendant Kroncke requested and was granted permission to defend himself and to present his defense of justification based upon religious necessity. It is defendant Kroncke's intention to file a separate brief pro se on that defense. For that reason, counsel will not touch on that defense and will include in this statement of facts only a brief reference to those facts relevant to the joint defense.

Defendant Kroncke explained to the court the basis of his defense of religious necessity:

> "I am not alleging that I committed a political act from religious inspiration, but I am saying I committed a religious act in itself . . ." T. Vol. I, p. 19

> "There is a big difference between a religious act and an act motivated by religious inspiration, and that is the marked distinction of this Catholic radical tradition." T. Vol. I, p. 20

Francis Kroncke is a theologian. He has a masters degree in theology from the University of San Francisco and has worked towards his PhD in theology at the University of Chicago (T. Vol. VI, p. 48). He has taught theology at the San Francisco College for Women (T. Vol. VI, p. 40), at Rosary College near Chicago, Illinois (T. Vol. VI, p. 48), and at St.Catherine's College in St. Paul, Minnesota (T. Vol. VI, p. 77).

Mr. Kroncke was educated in the Catholic school system and he

attended a Franciscan seminary and novitiate from 1959 to 1962. He left the seminary because he was bothered by the contradiction of the wealth surrounding him in the seminary (T. Vol. VI, p. 9). He felt that this wealth would destroy his concept of service.

> ". . .so I left the seminary but I still had the ideals of living in a community of trying to serve people." T. Vol. VI, p. 10

He attended St. John's University, Collegeville, Minnesota, and graduated with honors in 1966. After graduation from St. Johns' University, Mr. Kroncke worked in the summer of 1966 in the Easter Seal Camp for Crippled Children and Adults in California (T. Vol. VI, p. 29).

In 1966 Mr. Kroncke requested a conscientious objector classification from his local draft board (T. Vol. VI, p. 28). In the spring of 1967 his local draft board, against his wishes, classified him II-A since he was teaching theology in College.

In 1968 Mr. Kroncke received his masters degree in theology from the University of San Francisco.

In 1968 Mr. Kroncke was accepted at the University of Chicago to do his doctoral work in theology (T. Vol. VI, p. 40). During 1968 Mr. Kroncke taught sacramental theology at Rosary College in River Forest, a suburb of Chicago (T. Vol. VI, p. 48).

In the fall of 1969 Mr. Kroncke received his conscientious objector classification (T. Vol. VI, p. 62) and interrupted his theological studies in order to perform his alternative service. He became Program Director at Newman Center, the Catholic religious center at the University of Minnesota (T. Vol. VI, p. 63).

Father William C. Hunt testified for the defendants. Father Hunt is a Catholic priest, and the Director of the Newman Center, (T. Vol. V, p. 132). He studied for four years at the Gregorian University in Rome and received his license in theology (T. Vol. V, p. 133). He subsequently received a doctor's degree in sacred theology from the Catholic University of America (T. Vol. V, p. 133). He attended the Second Vatican Council as a preitus, an official expert in theology (T. Vol. V, p. 134). Father Hunt has been chairman of the Theological Questions Committee of the Presbytery of the Archdiocese of St. Paul and Minneapolis (T. Vol. V, p. 134-135) and is an expert on what the Second Vatican Council did and meant (T. Vol. V, p. 135-136). Father Hunt stated that the topic of war was a central topic discussed among the Catholic theological experts at the Second Vatican Council (T. Vol. V, p. 136). He explained that the documents issued by the Second Vatican Council concerning war were intended to guide all of the people of the church in developing their lives (T. Vol. V, p. 136).

Mark L. Jesenko, a lay theologian, testified for the defendants, Mr. Jesenko has a masters degree from the University of San Francisco (T. Vol. V, p. 83). He is director of religious education for a local Roman Catholic parish and is on the faculty of the College of St. Catherine's in St.Paul, Minnesota, engaged in teaching theology. His area of specialty is sacred scripture (T. Vol. V, p. 84).

Mr. Jesenko spoke of the early history of the Christian tradition in which the Christian's concept of community caused them to come into conflict with the predominant culture in which they were living (T. Vol. V, p. 95).

Father Alfred Janicke, a Roman Catholic priest, testified for

the defendants. Father Janicke was arrested in September, 1968, as a member of the "Milwaukee Fourteen" for burning draft files in Milwaukee.

He explained that draft raid actions such as undertaken by the defendants in this case bring moral issues to the people's consciousness (T. Vol. V, p. 120).

Dr. Alan Hooper testified for the defendants. He is a professor in the Department of Genetics and Cell Biology at the University of Minnesota, has a PhD from Johns Hopkins University and is a research publisher in his field (T. Vol. V, p. 62-63). He explained that the scientist must assume socio-political responsibility for his work, especially in reference to war (T. Vol. V, p. 66-68). He further explained that a very significant crisis which has caused the change of attitudes in the scientific community has been the Vietnam war (T. Vol. V, p. 68).

At the conclusion of the testimony, the defendants presented three proposed instructions to the court. These instructions appear in the transcript, Volume VI, pp. 160-161, 162. They are attached hereto as an Addendum, p. 1b, 2b. Although the instructions were gone over with the court prior to the noon hour (T. Vol. VI, p. 162), there was no indication that the instructions would be either granted or refused until they were actually refused in the course of the instructions while being given to the jury. During the course of the trial, the prosecution had made repeated motions to strike the defendants' testimony relating to justification. The prosecution's motions from time to time were always taken under advisement. After argument and in the instructions to the jury, counsel and the defendants for the first time discovered the court's intention to grant

the prosecution's motions and to strike the various testimony (T. Vol. VI, p. 148). The court's instructions insofar as they relate to the claims of the defendants begin on 147 of Volume VI of the transcript and continue through page 154. That portion of the court's instructions are attached hereto as an addendum, p. 2b-8b. They include the following statements:

> "I am now going to instruct you that all of what has been received along this line is immaterial." T. Vol. VI, p. 148

> "I do now so rule and strike all of the testimony offered by both defendants except for their own personal testimony and I strike that part which attempts to rely on a justification on account of the Vietnam war or religious oriented reasons." T. Vol. VI, p. 149

Counsel and the defendants objected at length to the granting of the motion to strike, to the court's instructions and to the court's failure to grant the requested instructions of the defendants (T. Vol. VI, p. 158-164).

The jury apparently was confused by the procedure and the judge's instructions and returned after several hours of deliberation with a question:

> "What testimony, evidence on behalf of the defendants is admissible? What is not?" T. Vol. VI, p. 165

The court repeated that portion of his instructions which relate to the government's motion to strike the testimony of all of the defendants' witnesses (T. Vol. VI, p. 165-166). The foreman reported that the jury is still presented with the questions concerning documents introduced by the defendants including Vatican II documents and the humanities paper written by Mr. Therriault (T. Vol. VI, p. 166). The court answered that the documents were not to be considered (T. Vol. VI, p. 166). The defendants objected to the re-reading of that portion of the instructions (T. Vol. VI, p. 166-167).

ARGUMENT

I. THE COURT SHOULD HAVE PERMITTED THE JURY TO DETERMINE IF THE EVIDENCE SATISFIED THE REQUIREMENTS FOR THE DEFENSE OF NECESSITY.

THE LAW

THE DEFENSE OF NECESSITY. Section 3.02 of the Model Penal Code of the American Law Institute provides as follows:

"Section 3.02. Justification Generally: Choice of Evils.

(1) Conduct which the actor believes to be necessary to avoid an evil to himself or to another is justifiable provided that:

(a) the evil sought to be avoided by such conduct is greater than that sought to be prevented by the law defining the offense charged; and

(b) neither the Code nor other law defining the offense provides exceptions or defenses dealing with the specific situation involved; and

(c) a legislative purpose to exclude the justification claimed does not otherwise plainly appear."

Section 3.01 of the Model Penal Code provides:

"(1) In any prosecution based on conduct which is justifiable under this article, justification is an affirmative defense."

The above proposals were published initially by the Institute as part of Tentative Draft No. 8, May 9, 1958. That draft contained the following comments to Section 3.02:

"1. This section accepts the view that a principle of necessity, properly conceived, affords a general justification for conduct that otherwise would constitute an offense; and that such a qualification, like the requirements of culpability, is essential to the rationality and justice of all penal prohibitions.

The principle is subject to three vital limitations:

(a) The necessity must be avoidance of an evil greater than the evil sought to be avoided by the law defining the offense charged. The balancing of evils cannot, of course, be committed merely to the private judgment of the actor; it is an issue for determination in the trial. What is involved may be described as an interpretation of the law of the offense, in light of the submission that the special sit-

uation calls for an exception to the prohibition that the legislature could not reasonably have intended to exclude given the competing values to be weighed.

(b) The issue of competing values must not have been foreclosed by a deliberate legislative choice, as when the law has dealt explicitly with the specific situation that presents the choice of evils or a legislative purpose to exclude the justification claimed otherwise appears. . .

(c) When the actor has made a proper choice of values, his belief in the necessity of his conduct to serve the higher value exculpates -- unless the crime involved can be committed recklessly or negligently. . .

2. While the point has not been free from controversy, it seems clear that necessity has standing as a common-law; such issue as there is relates to its definition and extent. . .

3. We see no reason why the scope of the defense ought to be limited to cases where the evil sought to be avoided is death or bodily injury or any other specified harm; nor do we see a reason for excluding cases where the actor's conduct portends a particular evil, such as homicide. The principle involved is one of general validity; it is widely accepted in law of torts (see, e.g. Restatement Sections 197, 262, 263, 269, 275) and there is even greater need for its acceptance in the law of crime. And while there may be situations such as rape, where it is hardly possible to claim that greater evil was avoided than that sought to be prevented by law defining the offense, that is a matter that is safely left to the determination and elaboration of the courts. Suppose, for example, that the actor has made a breach in a dike, knowing that this will inundate a farm, but taking the only course available to save a whole town. If he is charged with homicide of the inhabitants of the farm house, he can rightly point out that the object of the law of homicide is to save lives. The life of every individual must be assumed in such a case to be of equal value and the numerical preponderance in the lives saved compared to those sacrificed surely established an ethical and legal justification for the act. .

Property may be destroyed to prevent the spread of a fire. A speed limit may be violated in pursuing a suspected criminal. An ambulance may pass a traffic light. Mountain climbers lost in a storm may take refuge in a house or may appropriate provisions. A cargo may be jettisoned or an embargo violated to preserve the vessel. An alien may violate a curfew order to reach an air raid shelter. A druggist may dispense a drug without the requisite prescription to alleviate distress in an emergency. A developed legal system must have better ways of dealing with such problems than to refer only to the letter of particular prohibitions, framed without reference to cases of this kind.

4. It is true, of course, that the principle formulated in

the Section is inevitably lacking in precision. There is room for disagreement on what constitutes an evil and which of two evils is the greater. This, we submit, is not a serious objection to the rule. In the first place, since a defense is involved, uncertainty is per se less objectionable than it would be in defining an offense; it is better to be allowed a defense of uncertain ambit than none at all. Specific legislative attention to the choice of evils problem can, moreover, reduce the uncertainty in part.

In the second place, the lack of precision in the general rule is unavoidable; it is akin to the imprecision of such concepts as recklessness and negligence, which also call in part for weighing of conflicting values. Deep disagreements are bound to exist over some moral issues, such as the extent to which values are absolute or relative and how far desirable ends may justify otherwise offensive means. Thus even when a specific legislative resolution may be theoretically possible, it may be quite unattainable to adjudication, as they arise in concrete cases, has, therefore, much strategic virtue. . .

5. As stated above, the formulation makes the actor's belief in the necessity sufficient (assuming a valid choice of evils) unless the crime can be committed recklessly or negligently, in which case recklessness or negligence as to the necessity suffices. Questions of immediacy and of alternatives have bearing, of course, on the genuineness of a belief in necessity, as well as on the actor's recklessness or negligence when either is material. Not even actual necessity suffices unless the actor acted on belief in its existence; under the formulation in the draft, one cannot act by accident from necessity."

While it appears that few cases have actually dealt with the defense of necessity references to the defense appear in almost every discussion of criminal law, English and American. The most detailed discussion of the concepts underlying the principle that necessity can justify an act that would otherwise be criminal appears in Hall, Principles of Criminal Law (1947), pages 377-426. Hall, supra, at page 391 cites the decision of United States vs. Holmes, 26 Fed. cas. 360, 1 Wall Jr. 1) Number 15, 383 (E.D.Pa. 1842) as the leading decision in this country on the defense of necessity. Thirty of the different states have some legislative formulation on the subject. Legislative formulations are embodied in the Canadian Code (1954), the British

Code for Cyprus (1928), the criminal codes of Queensland and Western Australia (Sec. 25), the Indian Penal Code (Sec. 81), the German Penal Code (Sec. 34), the Italian Penal Code (Art.54), the Yugoslav Code (1951, Art. 12), the Philippine Code (Art. 21, 2).

Although Professor Hall cites U.S. vs. Holmes (supra) as the leading case in the United States, it was preceded by the decision in U. S. vs. Ashton, 24 Fed. cas. 873, No. 14,470 (C.C.D.Mass. 1834). This was an indictment for an attempt to commit a revolt against Sec. 12 of the criminal laws of the United States. The defendant, James Ashton and others, were indicted for an endeavor to commit a revolt aboard the ship Merrimack of Boston on the high seas. At the trial, it appeared that the ship sailed from Boston on the 23rd of August, 1834, on a voyage to Rio de Janeiro. The crew believed the ship to be in a leaky condition and on discovery of the leak, expressed a wish to the captain to return to have repairs made. Apparently, four days after the ship sailed, the ship ran into a storm and the crew refused to do any further duty and forced the captain to agree to return to Boston where it arrived on the ninth day after departure.

The acts of the crew were in violation of congressional acts relative to revolt. The defense was that the crew had to act out of necessity because the ship was unseaworthy. There was conflicting testimony on the state of the ships condition. The chief mate swore that the ship was seaworthy. The second mate swore it was not. The owners testified to the seaworthy condition and insurance had been underwritten based on that. The prosecuting attorney took the position that all of the testimony concerning the unseaworthiness was irrelevant.

The case was decided by Circuit Judge Justice Story. Justice Story said:

> "In the present case of a combination to resist the authority of the master is clearly established; and unless the seamen were by the circumstances justified in compelling the master to return home, the offence charged in the indictment is fully made out; and the onus is on the seamen to establish the justification."

In discussing the issue of justification Circuit Justice Story says:

> "The law deems the lives of all persons far more valuable than any property; . . . Still if the case does occur if they will insist on proceeding no matter at what hazard to life and the ship is unseaworthy, I am clear that the crew have a right to resist and to refuse obedience. It is a case of justifiable self-defense against an undue exercise of power.
>
> I have had this subject a good deal in my thoughts during the progress of this trial (and the point is certainly a new one); and the strong inclination of my opinion at present is, subject to be changed by any argument hereafter urged, that the defendants ought not to be found guilty, if they acted bona fide upon reasonable grounds of belief that the ship was unseaworthy, and if the jury, from all the circumstances are doubtful, whether the ship was seaworthy or even in a measuring cast should incline to believe the ship seaworthy. If she was clearly seaworthy beyond reasonable doubt, then the defendants ought to be convicted for the facts of the combination and resistance are admitted."

U. S. vs. Ashton, supra, was cited and relied on in U. S. vs. Nye, 27 Fed. Cas. 210 No. 15,906 (C.C.D. Mass. 1855) and U.S. vs. Staly, 27 Fed. Cas. 1290 No. 16,374 (C.C.D.R.I. 1846). U. S. vs. Nye, supra, involved an indictment for attempting to revolt in which the defense raised was the same defense as that raised in U. S. vs. Ashton. The issue was submitted to the jury and the jury found from the facts that the seamen were unjustified in their conduct. U. S. vs. Staly once again involved an indictment for an endeavor to commit revolt, and again the defense was raised of necessity as a result of the unseaworthy condition of the ship. In that case, the jury could

not reach a verdict. Time does not permit a full discussion of the remarkable events in U. S. vs. Holmes, supra, which led to the throwing off of passengers from a sinking life boat. As indicated, the case occasioned an expansive discussion of problems of necessity. Among the more relevant statements are the following:

> "Where indeed the case does arise embraced by this "Law of necessity' the penal laws pass over such case in silence. ."

> "And I again state that when this great 'Law of Necessity' does apply and is not improperly exercized, the taking of life is divested of unlawfullness."

Hall, supra, calls U. S. vs. Ashton and the other cases referred to the "most persuasive illustrations of the validity of the legal doctrine of necessity." He places them in the same category as the classical illustration when on a perilous voyage:

> "The mariners were afraid and cast forth the wares that were in the ship into the sea to lighten it of them." Jonah, chapter 1.

Among the cases holding that the defense of necessity was available is Rex vs. Borne (1939), 1 KB 687, 3 All Er 615. In this case a doctor performed an abortion claiming that he believed that his acts were necessary to save the life of his patient. The court permitted his belief and the facts upon which he based his belief to be presented to the jury, notwithstanding the absolute language of the English code which at that time forbad an abortion. A not guilty verdict was returned.

The Massachusetts court apparently agreed with the courts of England in Commonwealth vs. Wheeler (1944) 315 Mass. 394, 53 N.E. 2d 4, wherein a good faith belief in the necessity of an abortion to save the health of a woman was sufficient to avoid a conviction for performing an illegal abortion.

In State vs. Jackson, 71 N.H. 551, 53 Atl. 1021 (1902), a

father was charged with violating the compulsory attendance law by keeping his child home from school. Several defenses were raised by the parent including the alleged unconstitutionality of the compulsory attendance law. In addition, the father claimed that he was acting out of a reasonable belief that his child's health was in danger if he attended public school. The court held that while the compulsory attendance laws were clearly constitutional, the facts concerning the father's belief and the reasonableness of that belief were for the jury. On the grounds that if reasonably "and necessity" to save the life of his child would justify a violation of the compulsory attendance law.

C & O Rly Company vs. Commonwealth, 119 Ky. 519, 84 S.W. 566 (1905), is a remarkable case in that the railroad was charged with violating the duty to provide a separate coach for black and white persons. This statute appears to be a statute in which intent is not a factor. The railroad admitted that it did not comply with the statute, but claimed that its acts were justified:

> "In Stephen's digest of Criminal Law at 32, it is said: 'An act that would otherwise be a crime, may be excused if the person accused can show that it was done only in order to avoid the consequences which could not otherwise be avoided and which had they failed would have put upon him or upon others, who he was bound to protect, inevitable or unavoidable evil; that no more was done than was reasonably necessary for that purpose; and that the evil inflicted by it was not disproportionate to the evil avoided.' Enc. of Laws and Procedures, Vol. 12, page 160."

See also Williams, Criminal Law, Sec. 172 et seq. where he poses the problem thusly:

> "The question now to be considered is how far necessity is a general defense in crime, even where it is not been specifically provided for by statute. By necessity is meant the assertion that conduct promotes some value higher than the value of literal compliance with the law." p. 567

Williams, supra, points out that under the defense of necessity one is entitled to defend persons other than himself (Sec. 174). He gives instances of necessity and larceny (Sec. 175). (In this section he gives examples to show that the necessity of appeasing hunger is a defense when the social services are inopposite.) He also gives examples of necessity and homicide (Sec. 176):

> "The 4th case involves a plurality of persons. A kills B and others to save C and others. Thus, he may open a breach in a dyke which he knows will inundate one area but avoid a more disastrous collapse. If his act was intended to result in a net saving of lives, it would surely be justified by necessity." p. 580-581.

Williams also points out that the defendant's belief in the necessity of his acts and the reasonableness of these beliefs are essential to the defense of necessity, Sec. 178.

See also State vs. Johnson, (1971, Minn.) 183 N.W. 2d, 541, where the Minnesota Supreme Court recently commented:

> "There are few American authorities on the doctrine of necessity and we have found no Minnesota cases on its use as a common law criminal defense. In most of the cases the act done by the defendant was done for the preservation of life and this is the main application of the defense although tort law recognizes necessity to save property. . .
>
> In Minnesota the defense of necessity has been incorporated into several criminal statutes by the legislature. See Minn. St. 243.52; 609.06; 609.065; and 609.765. In 21 Am. Jur. 2d Criminal Law Sec. 99 it is stated that there is some authority to the effect that an act done from compulsion or necessity is not a crime."

Based upon the above principles the defendants produced testimony which can be summarized as follows:

(1) The records which the defendants allegedly were intending to remove and destroy were records of persons who have registered and were subject to induction under the Military Selective Service

Act of 1967. Note particularly the testimony of prosecution witness Knight.

(2) By the use of the records persons are required, without their consent, to serve in the Armed Forces of the United States. Specific testimony concerning the numbers of persons who were unwilling to serve in the Armed Forces of the United States was offered to highlight the compulsory nature of the process. The court rejected this testimony (T. Vol. III, p. 82-83).

(3) Persons who are required to serve in the Armed Forces of the United States are required to serve at any place where the United States Government chooses to send them.

(4) A significant number of the persons involved will be required to serve in the Armed Forces of the United States in Vietnam, Laos, Cambodia. Note particularly the testimony of the witnesses Neilson, Anderson and Glass.

(5) While in the United States Armed Forces in Indochina those persons will be engaged in active armed conflict and in active support of the United States Army's actions in Indochina (witnesses Glass and others).

(6) The active, armed conflict in Indochina has been continuing for many years and still continues. Persons required to serve in the armed forces are wounded or otherwise injured and killed by reason of their service. Note particularly the testimony of the witnesses Glass, Taylor and Ellsberg.

(7) Massive numbers of persons have been uprooted from their homes, wounded, injured and killed by reason of the actions of the United States Armed forces in Indochina. The scale of damage to human life is almost incomprehensible. See testimony of witness

Taylor.

(8) The defendants believe that their acts were necessary to avoid the evils set forth above, which evils, in summary, include:

(a) The forced "criminalization" of persons in Minnesota and elsewhere by their unwillingness to participate in the U.S. military. We again point out the significance of the testimony of the witness Gutknecht and the offered testimony which was rejected of the witness Knight.

(b) The injury and death of persons required to serve in the military service. Testimony of witness Glass.

(c) The injury, death and destruction of the people of Indochina. Note the testimony of the witnesses Taylor, Westing and Ellsberg.

(9) The defendants' beliefs in the necessity of their acts are reasonable in view of the facts of escalating American involvement in the war notwithstanding growing opposition to the war. In this regard the testimony of the witnesses Davidov, Lynd and Ellsberg all point out the reasonableness of the defendants' beliefs in the necessity of their action.

From the above we conclude that the evils sought to be avoided by the defendants are far greater than those sought to be prevented by the law defining the offense. The defendants acted to avoid these evils. They believed their acts to be necessary which belief was reasonable, thus, they were justified in their acts.

We do not ask the court to rule as a matter of law that the defendants' acts fall within the defense of necessity. The determination of that question is properly for the jury. We argue that it was error for the trial court to refuse to submit the matter to

the jury on proper instructions so that the jury could carry out its duty.

The prosecution will undoubtedly argue that the records that the defendants attempted to destroy and their relationship to the war in Vietnam as well as to others and the character of that war are clearly irrelevant. That argument has been made frequently. But is it so? Would it be irrelevant if the records involved were lists of Jews marked for extermination in gas ovens? What if the records consisted of a list of the names of judges marked for execution? Would it be no defense to describe the situation in which one acted to save those persons? Are the rhetorical questions really far fetched? Do the records not contain a list of names of the young men who face the alternatives of going to war and killing or be killed? Has this not continued for years and does it not now continue in spite of the apparent opposition of masses of our people? Does the alternative of prison or expatriation for the listees make their position any less hazardous?

It is argued that the harm is not acute or immediate. It is if your name is on that list or you live in Southeast Asia.

Would you say it was proper to attempt to destroy the lists of the persons about to be exterminated but not the plans for the gas ovens because those plans represent no threat of immediate harm? Where do you draw the line and who should draw it? Isn't that precisely the function of the jury?

It is important to understand that the defendants do not claim that their acts were justified as necessary simply because of the scale, character or duration of the war in Vietnam, or

simply because of the relationship of this war to the selective service records or simply because of the effect of these records on the young people in this country, or simply because the defendants believed that their acts were reasonable and necessary and such belief has a basis in history both current and past. But the defendants do argue that, taken as a whole, the records amply demonstrate that the defendants acted to avoid and ameliorate gross danger to thousands, even millions of human lives, by taking a step which endangered no persons life but which act did hold out the possibility of help for those persons.

The record shows that the defendants believed their acts were necessary and a jury, having heard the evidence, might well find that such facts do exist as make that belief reasonable.

Such a jury verdict might have many consequences. It might offend many. It might also give hope to some. It might demonstrate that our judicial system has the present capacity to deal with the most difficult moral and ethical problems that can be raised during the course of a prolonged war that has divided our nation, alienated our youth and defamed our democratic heritage. It might give hope and courage to those who believe that dialogue with twelve citizens selected at random who promised to listen and weigh facts and arguments is indeed one of man's most noble creations for the resolution of disputes between the state and its citizens. In short, it might help to restore the Federal Judiciary to the high place in the hearts and minds of our people from which it appears to have fallen and to which in the past it has so richly earned.

The pity is that we do not, of course, know the souls of the

jurors that heard the evidence and do not know what verdict they would have rendered if the court had not removed the evidence from their consideration. With the biased eye of an advocate we observed the wet faces and heard the faltering affirmation of the guilty verdict. We made favorable conjectures. The record will show that the defendants had no natural allies on the jury. To a person, they were middle aged, middle America, white and unexceptional. If the court had permitted them to act on the evidence and on the requested instructions we would have had no argument. The defendants struck a kind of bargain with the court. They would state their case, explained in advance to the court, to a jury selected by the court. Such statement would be reasoned, relatively short and responsible. Except for the closing argument of the prosecuting attorney the record is devoid of irresponsible rhetoric. At the conclusion of six days and after the closing arguments, the court, for the first time, advised the defendants and the jury that he alone was determining the reasonableness of the defense and such determination excluded their participation in the issues. He might just as well have directed a guilty verdict. A retrial of the issues in this case will be exceedingly difficult. Each moment of history is unique and the defendants and the jury shared one moment. A new trial would be a different moment in history before a different jury for, unfortunately, the previous jurors cannot be called back together and take up their deliberations from the point where they were interrupted. In spite of this a new trial must follow and the defendants

be required to once again muster their courage and intellects before twelve of their co-citizens in an effort to reach a noble verdict. To do less would be a step backwards in the progress of man and to lose a possible glorious moment in the history of the growth of our judicial system.

II. THE COURT ERRED IN FAILING TO ADVISE COUNSEL OF HIS RULING ON REQUESTED INSTRUCTIONS UNTIL AFTER CLOSING ARGUMENTS.

The court committed plain error in failing to rule on the defendants' requested instructions until after the arguments of counsel. Rule 30 of the Federal Rules of Criminal Procedure provides:

> "At the close of the evidence or at such earlier time during the trial as the Court directs, any party may file written requests that the Court instruct the jury on the law as set forth in the requests. At that same time copies of such requests shall be furnished to adverse parties. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. . ."

Defendants presented proposed instructions to the court in writing pursuant to the Rule. See Addendum pp. 1b, 2b. We believe they were before the court for most of the trial. After all parties rested, the parties had extensive and prolonged arguments on the instructions in chambers. The recess is indicated in the transcript at Volume VI, p. 138. After the court's instructions (T. Vol. VI, pp. 139-157) counsel objected at length to the court's rulings and the instructions (T. Vol. VI, pp. 158-164). The court indicated that he went over the instructions prior to the noon hour with counsel and that the proposed instructions of defendants are refused (T. Vol. VI, p. 162). The discussion in chambers after the parties had rested was extensive and prolonged.

As indicated, he combined his refusal to grant the defendants' instructions with his ruling striking the defendants' evidence from the case.

The controlling case in point is Wright vs. U.S. (9 Cir., 1964) 339 F. 2d 578. In Wright, supra, appellant's counsel submitted written requests for instructions reflecting their theory of the defense. The court did not rule on the requests. In reversing the conviction the court said:

> ". . .Appellant contends that the district court failed to comply with the mandate of Rule 30, Federal R. Crim. P., that 'The court shall inform counsel of his proposed action upon the requests prior to their arguments to the jury * * * .' The government argues that the court complied with the rule; and, if it did not, the error was harmless.
>
> The obvious object of the rule in point is to require the judge to inform the trial lawyer in a fair way what the charge is going to be, so that they may intelligently argue the case to the jury. Ross vs. U.S., 180 F 2d 160, 165 (6 Cir., 1958). See also Downie vs. Powers, 193 F 2d 760, 766-767 (10 Cir., 1951). Measured against the purpose of Rule 30, we think the court's cryptic remarks were inadequate.
>
> Nor can we say that the error may be disregarded as not effecting appellant's substantial rights. Rule 52(a), Fed. R. Crim. P. Because the court failed to clearly inform counsel of its ruling on his request, counsel's closing argument was based upon a theory of defense which the court rejected, or at least ignored, in its subsequent instructions. We cannot say that this did not impair the effectiveness of counsel's arguments and hence of appellant's defense."

See also Ross vs. U.S., 180 F 2d 160 (6 Cir., 1958); U.S. vs. Crescent-Kelvan Co. et al, (2 Cir., 1948) 164 F 2d 572; Wright, Federal Practice and Procedure, Criminal Section 481 et seq and Devitt and Blackmar, Federal Jury Practice and Instructions, Section 7.01 et seq.

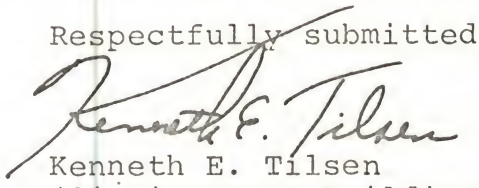
RELIEF SOUGHT

The defendants ask for an order of the court granting a

new trial.

Such an order should indicate that the evidence offered by the defendants as set forth in the record and briefs should be received in evidence and that the jury should be instructed in accordance with the defendants' proposed instructions.

Respectfully submitted,



Kenneth E. Tilsen
400 Minnesota Building
St. Paul, Minnesota 55101

Attorney for Appellants

July 1971.

ADDENDUM

Defendants' request for instructions to the jury:

INSTRUCTION NO. 1

The defendants do not deny the allegations of the indictment. They have asserted defenses known in the law as justification. There are two separate claims of justification raised by the defendants. If you find that the defendants have proved that their acts were justified under either of the claims advanced by the defendants, then you should return a verdict of not guilty for both defendants.

INSTRUCTION NO. 2

The defendants claim that they acted to avoid certain evils, that the evils sought to be avoided by the defendants were far greater than those sought to be prevented by the law whose terms they admit violating, that they believed their acts were necessary and that their belief in the necessity of their acts was reasonable. Thus they were justified in their acts.

I instruct you that if you find that the evils sought to be avoided by the defendants are far greater than those sought to be prevented by the law defining the offense and that the defendants acted to avoid those evils upon the belief that their acts were necessary and if you find that such belief in the necessity of their acts was reasonable then the defendants' acts were justified and you should return a verdict of not guilty.

INSTRUCTION NO. 3

The defendants also claim that their acts were necessary

religious acts and thus specifically protected by the first amendment to the Constitution of the United States which states in part:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof;. . ."

The necessary elements of the defendants' claim as to this defense are that the defendants acted to avoid and exorcise from society certain evils, that those evils were far greater than the evils sought to be avoided by the law whose terms the defendants admit violating, that as a matter of religion the defendants believed it was necessary for them to so act and their belief in the necessity of their acts was reasonable.

I instruct you that if you find that the evils sought to be avoided and exorcised by the defendants were far greater than those sought to be prevented by the law defining the offense and that the defendants acted to avoid those evils upon the belief that their acts were necessary religious acts and that such belief in the necessity of their acts was reasonable, then the defendants' acts were justified and protected by the First Amendment of the United States Constitution and you should return a verdict of not guilty.

Excerpts from the transcript, Vol. VI, p. 147:

"Several days ago in this trial the court was confronted with a motion by the government to exclude any and all evidence relating to excuse or justification. The court at that time felt and stated to the parties and to the jury that in fairness to the defendants he hesitated to prejudge the case and so determined that

the court could not rule in advance on the admissibility or effect of evidence, though the court did give cautionary instruction at the time and admitted the evidence proffered with certain efforts to restrict what the court considered some far-out clearly irrelevant reaches thereof. The court has now, as has the jury, heard the evidence concerning the attempted justification. It is based on the theory as to both defendants that the Vietnam war is an evil and the evil sought to be avoided by defendants is greater than the evil sought to be prevented by the law defining the offense; that they believed their acts to be necessary, that their belief was reasonable and therefore they were justified in their actions. Both defendants in their closing arguments have attempted to enlarge upon and buttress this theme. In addition both defendants, though the testimony was presented briefly by defendant Francis Kroncke, claims that they were compelled or moved by religious and theological motives and that what they did is characterized in some way as a religious act. Mentally you may chide the court for being so equivocal and for keeping you here for several days to hear the Vietnam and the religiously oriented testimony because I am now going to instruct you that all of what has been received along this line is immaterial. The government has moved to strike the testimony of all of the defendants' witnesses, except the testimony of the two defendants and as to their testimony all reference to the Vietnam war and theology and religion.

The court, after reflection and after hearing all the evidence, has concluded that this motion should be granted and I do now so

rule and strike all of the testimony offered by both defendants except for their own personal testimony, and I strike that part which attempts to rely on a justification on account of the Vietnam war or religious oriented reasons. Consequently, all that you have before you for consideration are the facts concerning what occurred at Little Falls, Minnesota on the late evening of July 10, 1970. You have a very limited responsibility in this case.

Now defendant has argued that the law must recognize their right to choose between what they consider in their own personal judgment the lesser of two evils and that they are free to determine what they deem to be an evil and which, if there is more than one evil, which is the greater. They further contend that when acting on such a choice they may not be found guilty of a criminal offense. Now you are instructed that that is not the law.

The defendants' claimed justification is urged to be a three point defense. First, Necessity. There is perhaps in the law a very narrow and limited doctrine of necessity, and as for instance where one is confronted by an inevitable immediate event or with a sudden emergency and in reacting thereto quickly he breaches some law in a good faith effort to do what he deems best. I instruct you that such a doctrine, whatever its exact definition and scope, has no application to this case where the entry into the draft board office was a contemplated act, conceived according to defendant Therriault a month or more before the event and done deliberately and with forethought. Second, defendants claim they were "preventing the greater evil". Defendants claim

to see an evil in the Vietnam war and assert that their symbolic act of attempting to destroy government records in some way will contribute or would have contributed to, had it been successful, what they see as a growing change in foreign policy. You are instructed that this claimed defense, irrespective of whether the Vietnam war is or is not an evil and irrespective of the sincerity of the defendants, is not before you and that defense is not to be considered by you.

In our democracy men cannot take the law into their own hands, make their own decisions as to which laws are bad or good, which present or prevent the greater or lesser evil and then act by destruction of property or otherwise in breaking a law in an attempt to carry forward their own objectives, motives and beliefs. We are not here trying a case against the Congress or against the President. We are not determining the scope or wisdom of the United States' foreign policy or of the Vietnam war. It is the law that no one has the right to determine on a personal basis and decide which laws will be obeyed and which will not because of alleged evils. Such does not constitute a defense in a criminal action, and you are to determine only whether the defendants are guilty of the act as charged relating to events at Little Falls, Minnesota.

Third, defendants claim their acts were reasonable. You are instructed that in a case such as this it is not a defense either for all of the aforestated reasons. Defendants claim they see growing criminality among draft age persons evidenced by the draft resistance movement. Clearly in the law this is

not a defense. There are many laws in force and effect and they in a sense make criminals of persons who do not abide them.

The federal government has an income tax law, for instance, and some people do not comply with it and thus subject themselves to possible criminal penalties. We have drug laws, interstate transportation laws, use of the mail laws and many others, all of which are violated from time to time but it is no grounds or justification for their disregard or breach that they create or make criminals of those who break them. All laws tend to make criminals if not obeyed.

I further instruct you that the defense articulated by defendant Francis Kroncke but joined by both defendants, i.e., assertion of a religious, theological motivation is not a defense in this case. Religious doctrine or belief of a person cannot be recognized or accepted as an excuse or justification for his committing an act which is a criminal offense against the law of the land.

Defendants have argued that under the United States Constitution there is a clause stating Congress shall make no law prohibiting the free exercise of religion; that the events at Little Falls, Minnesota on July 10, 1970 constituted in some way a religious act and therefore protected by the Constitution. I instruct you that this is not the law; that whatever one's religious belief, free exercise thereof does not justify or excuse the commission of a criminal act, or breaking a law or laws. Nor does freedom of speech and the right of peaceful assembly permit of or constitute a justification or excuse for criminal acts.

Lastly, I instruct you that you have no philosophical or religious or theological responsibility here at all. You have no responsibility to determine theological or religious questions, or the wisdom or the lack of wisdom in this government's policy in Vietnam or in foreign affairs, generally; nor the wisdom of Congress in enacting the Selective Service Act. If the war in Vietnam is wrong, if the Selective Service Act is wrong or if other things are wrong in this country, the remedy lies in the political arena, it lies in the halls of Congress or in the Executive Branch of government. In our own tripartite system of government, in this representative republic, the responsibility for government is vital. This includes the responsibility of Congress to enact the laws, even though bad laws in the minds of some or many, and the responsibility of the Judicial Branch of the government to interpret them and to apply them to particular fact situations in accordance with congressional acts.

We are here now in the whole scheme of that government applying our responsibility to the limited job that we have in the Judicial Branch of the government. You jurors are an important part of the Judicial Branch of the government when you are called from your homes and offices to sit here as triers of the fact under our judicial system.

Each of you said when you were chosen as jurors that you could be and that you would be fair and impartial. You stated you would find the facts as they were presented and that you would apply the law as the court gave it to you. I have now done this latter and stated the principles of law that apply and those that are claimed

to but do not apply. Now this is your sole and limited responsibility in this case.

We are not sitting here as judges of the defendants' political or religious beliefs, whether they are right or wrong or whether the government is right or wrong for legislating policies for the conduct of foreign affairs. Our democracy operates on the principle of the will of the majority and until that is changed by orderly process those who may disagree or may be affected must nevertheless abide the law. To permit a personal determination of what one thinks should govern his conduct and thereby rationalize or justify himself in breaking the law is not the law. It is for all of these reasons that the court has ruled that the testimony of the defendants' witnesses, except that of the defendants themselves, and that of the defendants themselves insofar as it relates to the claimed justification, is irrelevant and immaterial and it is for these reasons that I have instructed you to disregard that testimony and the defendants' final arguments that are based on such stricken evidence and which they have attempted to urge the defense of justification or excuse.